Supreme Court, U.S.
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No. 86-40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KIDDER, PEABODY & CO. INCORPORATED,

Petitioner,

VS.

INTRE SPORT, LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether this Court should Review On Writ of Certiorari Where a Conflict Has Arisen Between the Eighth Circuit and Second Circuit Whether Claims Under Section 10(b) and Section 15(c) of the Securities Exchange Act of 1934 are Arbitrable.

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COUNTERSTATEMENT OF THE CASE

This is an action in the United States District Court for the Southern District of New York by Intre Sport Ltd., formerly known as "International Trends", a New York corporation, against Kidder, Peabody & Co., Inc., a securities broker-dealer.

The amended complaint alleges, in relevant part, that Intre Sport purchased shares of a particular stock in reliance upon representations by Peter N. Brant, a Vice President and stockbroker for Kidder, Peabody, which were untrue statements of material facts in violation of Sections 10(b) and 15(c) of the Securities Exchange Act of 1934 (the "1934 Act'), 15 U.S.C. §78 et seq. The amended complaint also included a claim under Section 12(2) of the Securities

Act of 1933 (the "1933" Act"), 15 U.S.C. §77a et seq. and under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq. ("RICO").

The District Court subsequently dismissed the Section 12(2) claim as time barred and the RICO claim for failure to state a claim against Kidder, Peabody. The Court also ordered arbitration of all remaining claims including the Sections 10(b) and 15(c) claims under the 1934 Act.

On December 23, 1985, the same day on which the District Court issued its Opinion ordering arbitration of the federal securities claims, the Court of Appeals for the Second Circuit issued its decision in AFP Imaging Corporation v. Ross, 780 F.2d 202 (2d Cir. 1985), in which the Appeals Court held that con-

tract provisions providing for settling Section 10(b) claims by arbitration were "...of course, unenforceable under the law of this Circuit." Relying on AFP Imaging, Intre Sport moved for reconsideration of the District Court's order compelling arbitration of the federal securities claims. Thereafter the District Court, in an Opinion dated April 21, 1986, modified its decision and reinstated the implied causes of action under Section 10(b) and Section 15(c) of the 1934 Act.

At about the same time, the Court of Appeals for the Second Circuit issued its decision in McMahon v. Shearson/ American Express, Inc., 788 F.2d 94 (2d Cir. 1986) in which the Appeals Court specifically held that the law in the Second Circuit is still that 1934 Act

claims are not arbitrable.[1]

Recognizing that the Court of Appeals decision in McMahon was then controlling, Kidder, Peabody appealed from the District Court's order and, at the same time, moved for summary affirmation of the same order. Kidder, Peabody's motion for summary affirmance was granted by the Court of Appeals for the Second Circuit on June 17, 1986.

Two days after the petition in McMahon was filed Kidder, Peabody filed a petition for certiorari seeking to be heard on the proposition that McMahon was improperly decided by the Second Circuit.

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1. McMahon also contains the companion issue whether RICO claims are subject to arbitration. The Court of Appeals, likewise, ruled they are not.

THIS COURT SHOULD DENY CERTIORARI OR DEFER CONSIDERATION UNTIL McMAHON IS DECIDED

Every Circuit Court, excepting one, that has ruled on the issue of the arbitrability of 1934 Act claims, either prior to or subsequent to this Court's decision in Dean Witter Reynolds, Inc. v. Byrd, ____ U.S. ____, 105 S.Ct. 1238 (1985), has adhered to Wilko v. Swan, 346 U.S. 427 (1953) for the principle that pre-dispute arbitration agreements are unenforceable. A conflict between Circuits on this issue has only recently arisen by virtue of the Eighth Circuit Court of Appeals decision in Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶92,815 (8th Cir. July 9, 1986). In reaching its decision in Phillips, the Eighth Circuit relied upon this Court's

decision in Dean Witter Reynolds v. Byrd, supra, and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., ____ U.S. ____, 105 S.Ct. 3346 (1985) while expressly declining to follow the Second Circuit's holding in McMahon.[2]

However, this Court recently announced that it has granted the petition for certiorari in McMahon to resolve the conflict between the Second and the Eight Circuits. And since the issues raised in McMahon to be settled by this Court will dispose of the single issue

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2. The Court in Phillips acknowledged that ordinarily when deciding a case lacking precedent in that Circuit it would defer to another Circuit in order to avoid a conflict. However, the Eighth Circuit, Judge Ross dissenting, felt that Byrd and Mitsubishi invited reexamination of the Wilko doctrine.

in the instant case, namely, whether McMahon was properly decided by the Court below, [3] consideration of this case should be deferred until McMahon has been decided.

Furthermore, since the views of the Second Circuit on the issue of arbitrability of 1934 Act claims will be before the Court in McMahon, active review on certiorari of this case, which was summarily affirmed by the Circuit Court on the strength of McMahon, would be of limited value to this Court.

CONCLUSION

A granting of the petition of certiorari in this case would not provide this Court with a review of any issues

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3. Kidder, Peabody conceded that McMahon would be dispositive and used this as the basis for moving for summary affirmation before the Second Circuit.

not already before it in McMahon.[4] It is respectfully submitted that this Court should either deny certiorari or defer consideration until McMahon is decided.

Respectfully submitted,

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A Member of the Bar of
the Supreme Court and
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Ltd.

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4. Respondent Intre Sport endorses the opinion of the Second Circuit Court of Appeals in McMahon and strongly supports arguments presented by respondents McMahon, et. al., on appeal.